STATE OF MICHIGAN
IN THE SUPREME COURT

KENNETH MITAN,

Plaintiff-Appellee,

Supreme Court No._____

Court of Appeals #242486

Lower Court #01-94411-NZ

v

MAURA CAMPBELL,

Defendant-Appellant,

DEFENDANT-APPELLANT MAURA CAMPBELL'S APPLICATION FOR LEAVE TO APPEAL

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QUESTION PRESENTED FOR REVIEW

I. **Whether the Court of Appeals erred in reversing the trial court's grant of summary disposition because the trial court properly concluded that Plaintiff's defamation claim was barred by the statute of limitations since Plaintiff's complaint was filed more than one year after Defendant's original publication of the alleged defamatory statement?**

STATEMENT OF JUDGMENT APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

This case presents a novel issue for the Court's consideration related to the republication by a third party of an alleged defamatory statement and what the effective date of publication should be for purposes of applying the statute of limitations.

In this case, Defendant-Appellant Maura Campbell, Public Relations Director for the Department of Consumer and Industry Services (CIS), gave an interview to television reporter Shelly Smith of WXYZ-TV on February 22, 2000. During that interview Ms. Campbell allegedly referred to Plaintiff-Appellee Kenneth Mitan as a "bad egg" in conjunction with discussing wage and hour claims asserted by Plaintiff's employees, which were under investigation by CIS. Portions of the interview with Ms. Campbell were broadcast three days later on February 25, 2000. Plaintiff filed his defamation action on February 26, 2001, a year from the date of the broadcast.[1] Defendant filed a motion to dismiss Plaintiff's claim on the basis that it was untimely pursuant to the one-year period of limitations applicable to defamation actions. In response, Plaintiff argued that the pertinent date was February 25, the date of the broadcast, not February 22, the date of the interview, because the broadcast constituted a republication of the defamatory statements, and that was the date the clock started running on Plaintiff's claim.

The trial court rejected Plaintiff's argument, noting the absence of Michigan case law directly on point, and concluding that the pertinent date was February 22, the date of the interview and the original publication, because use of any other date would involve speculation. The trial court noted that an interview might be broadcast a day later, months later, or never, and

[1] February 25, 2001, was a Sunday, hence Plaintiff's filing of the suit on Monday, February 26, 2001.

that words may be altered or deleted in the process, and that absent a relationship between the first party and the republisher, the first party should not be responsible for a subsequent republication. Thus, the trial court granted summary disposition and dismissed Plaintiff's claim. Plaintiff timely filed an appeal by right with the Court of Appeals.

On May 20, 2004, in a short per curiam, unpublished opinion, the Court of Appeals reversed the trial court's grant of summary disposition, concluding that a question of fact existed regarding whether the republication of the alleged defamatory statements in the February 25, 2000, broadcast was the natural and probable result of the original publication to the reporter on February 22, 2000, such that Defendant could be liable for the republication. The Court of Appeals relied on *Tumbarella v Kroger Co*, 85 Mich App 482; 271 NW2d 284 (1978), in which the court held that the republication of a letter claiming that the defendant employee had stolen from his employer, Kroger, to several different Kroger stores was the natural and probable consequence of the original publication by Kroger management. *Id.* at 496. The court analogized that publication of the interview Defendant gave the reporter was a natural and probable consequence of the interview itself. Thus, the court concluded that there was a fact issue sufficient to withstand summary disposition with respect to whether the broadcast was the natural and probable consequence. The court assumed, without discussing, that the statute of limitations began to run from the date of the republication, February 25, 2001.

Before this decision, this state had not formally recognized or applied the "natural and probable" consequence exception to liability when determining whether the repetition of a defamatory statement by a third party creates a new cause of action against the original declarant. This exception has been rejected by other states, and the facts in this case simply did not, and do not, warrant adoption of this test under the circumstances. Moreover, the Court of Appeals'

decision essentially incorporates a "discovery rule" into the statute of limitations for defamation actions. This conflicts with the Michigan courts' general refusal to incorporate a "discovery rule" absent exigent circumstances. Accordingly, this Court should grant leave to appeal under MCR 7.302(B) in this case to clarify that Michigan courts will not recognize an exception to the statute of limitations based on the repetition of a defamatory statement by a third party. Or, that even if such liability is recognized, that the date of the original publication remains the pertinent date for determining the timeliness of the action.

STATEMENT OF PROCEEDINGS AND FACTS

On February 22, 2000, defendant Campbell, as Public Relations Director for CIS, gave an interview to WXYZ-TV reporter Shelly Smith regarding wage and hour claims investigated by CIS and related to Kenneth Mitan, a business owner. (Affidavit of Maura Campbell ¶ 3, attached as Exhibit 1.)[2] Before the interview, defendant Campbell contacted CIS personnel to obtain information about claims involving Mr. Mitan or his business that the department was handling. *Id,* ¶5. During the interview, defendant Campbell responded to questions and presented information provided by CIS department personnel concerning Mr. Mitan and his employees' claims. *Id,* ¶6.

Statements made during the interview were subsequently broadcast on WXYZ-TV three days later on February 25, 2000. *Id,* ¶6. The following statement made by defendant Campbell to Shelly Smith was reported during this story:

> Unfortunately, we've got a guy who has figured out all the loopholes, all the ways that he can appeal, all the ways that he can stay off having to pay his penalties. He's just a bad egg. [*Id*, ¶ 7; First Amended Complaint ¶ 3, Exhibit A to Plaintiff's Response to Summary Disposition, attached as Exhibit 2.]

This is the alleged defamatory statement that forms the basis for this action. (Exhibit 2, ¶¶ 3, 10)

Plaintiff filed suit in Oakland County Circuit Court on February 26, 2001. (Complaint, attached as Exhibit 3.) The First Amended Complaint alleges the actionable statement was made on or about February 25, 2000, by Ms. Campbell and was first broadcast by WXYZ-TV on or about that same date. (Exhibit 2, ¶ ¶ 3, 4) Defendant Campbell responded to the initial complaint

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[2] Mr. Mitan is not a stranger to the Michigan courts. See *Mitan Properties v Frandorson Properties*, 469 Mich 1005 (2004); *Mitan v New World TV, Inc*, 469 Mich 892 (2003); *In re Mitan*, 468 Mich 910 (2003); *Frandorson Properties v Mitan*, 467 Mich 864 (2003); *Nathan & Nathan, P.C. v Mitan*, 465 Mich 959 (2002); *Buscemi v Mitan*, 465 Mich 891 (2001); *Mount Hollywood Ltd Partnership v Bill Visnaw's Styling Barber Shop*, 461 Mich 905 (1999); *Sci-Tel Assocs v Michigan Nat'l Bank*, 454 Mich 918 (1997); *Mitan Properties Co III v Romeo Assocs*, 439 Mich 927 (1992).

with a Motion for Summary Disposition pursuant to MCR 2.116(C)(7), asserting that the statute of limitations barred Plaintiff's lawsuit. That motion was subsequently withdrawn at the hearing held May 9, 2001, because Plaintiff had filed his First Amended Complaint clearly specifying February 25, 2000, as the "publication" date. Because February 25, 2001, was a Sunday, the complaint was filed the next day, Monday, February 26, 2001.

Defendant then filed a Motion for Change of Venue to Ingham County Circuit Court pursuant to MCR 2.221 and 2.223 as venue was improperly laid in Oakland County. That motion was granted after a hearing held July 11, 2001, and the Order was entered September 20, 2001, changing venue to Ingham County Circuit Court.

On January 28, 2002, defendant Campbell filed a second Motion for Summary Disposition under MCR 2.116(C)(7), again asserting that the one-year statute of limitations barred Plaintiff's action. This motion was supported by the Affidavit from Campbell attesting that she was interviewed on February 22, 2000, and made the statement attributed to her in the WXYZ-TV story, that same date. (Exhibit 1.) Plaintiff's response to this motion argued that the February 25 broadcast was a republication of the original defamatory statement for which Defendant was liable, and that the statutory period ran from that date. (Exhibit 2.)

Defendant Campbell's motion was granted at a hearing held May 1, 2002. At that hearing, counsel for Plaintiff argued that the statue of limitations did not bar this action because it was not based on the February 22, 2000, interview but rather on the February 25, 2000, broadcast containing the alleged defamatory statement made during the earlier interview. (Transcript 5/1/02, pp 5-6, attached as Exhibit 4.) The trial court correctly and succinctly rejected that argument:

> THE COURT: Let me ask you a question. What constitutes the alleged libel here? Isn't it the statement from the lady to the newscaster? Isn't that the libel?

> Isn't the fact that they've later rerun it, that's a separate – they could have run it, say, yesterday. They could have waited three years. They could have not run it at all. Would you say that there was no libel if they, the newsstand had never ran it?
>
> MR. MITAN: The Plaintiff would never have known of the statement.
>
> THE COURT: That's not the issue. ... but it's pretty clear that you don't even have to have knowledge that the statement was made at the time it was made. The statute still starts to run when the injury occurs because I don't see that either of you have found a case that really specifically covers this. There was no conspiratorial conduct between these two to libel your client. This was a newscaster that came in, took a statement from somebody who then choose [sic] at some later time to run it. ... but you didn't cover what I think the critical question is. And I don't think there's any law in Michigan, that when you make a libel on day one, are you then liable for the restatement of that? ... I don't see where this person had any direct connection with when this was shown. I can go – news guy called me about the election last night, I made a few statements about things to him, all true of course, and then he may not run that in his news article until June, but my libelous statement would have been last night. [*Id.*]

After an additional exchange with counsel, the trial court concluded:

> THE COURT: Well, my opinion is that Michigan law does not cover this specific point. And I think that if parties are shown to be, by the fact to be acting in concert, you could have one liable, one responsible for the later statements and liable for the later one. But in this case where someone is interviewed and the third party may never repeat the statement and could repeat it, could use it, may cut part of it, they may even change it, whatever they wanted it to say, the first party is not responsible for that later admission unless there's some other showing. So I believe the statute has run in this case. [*Id.*]

The trial court's Order granting summary disposition and dismissing the case was entered May 17, 2002. Plaintiff filed a Motion For Reconsideration on May 30, 2002, (Motion for Reconsideration, attached as Exhibit 5), which was denied by an Order entered June 11, 2002. (Order, attached as Exhibit 6.) In his motion, Plaintiff relied solely on *Weaver v Beneficial Finance Co*, 199 Va 196; 98 Se2d 687 (1957), which held that where a republication of a defamatory statement by a third party is a natural and probable consequence of the original publication, the first party may be held liable, even if the original publication occurred outside the limitations period. (Exhibit 5.) In its Order denying reconsideration, the trial court simply

concluded that Plaintiff had failed to establish good cause for granting the requested relief because it was based on non-binding precedent and issues that the court had already ruled on. (Exhibit 6.)

Plaintiff timely filed his claim of appeal by right with the Court of Appeals. On appeal, Plaintiff argued that the trial court erred in concluding that the relevant date for purposes of determining whether Plaintiff's claim was barred by the one-year statute of limitations was February 25, 2000, the date of the broadcast, as opposed to February 22, 2000, the date of the interview. The Court of Appeals agreed with Plaintiff and reversed the trial court, concluding that an issue of fact existed regarding whether the republication of the "allegedly defamatory statements in the February 25, 2000 broadcast was the natural and probable result of the original publication to the reporter on February 22, 2000." (*Mitan v Campbell*, unpublished opinion per curiam of the Michigan Court of Appeals, Docket No. 242486, dec'd 5/20/04, attached as Exhibit 7.) Defendant seeks leave to appeal the judgment of the Court of Appeals to this Court because that court erred in applying an exception to the general rule that the original publisher of a defamatory statement is not liable for its subsequent republication by a third party, and in assuming that the exception creates a new limitations period.

ARGUMENT

I. The Court of Appeals erred in reversing the trial court's grant of summary disposition because the trial court properly concluded that Plaintiff's defamation claim was barred by the statute of limitations since Plaintiff's complaint was filed more than one year after Defendant's publication of the alleged defamatory statement.

A. Standard of Review

The grant or denial of a motion for summary disposition is reviewed de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Mahaffey v Attorney General*, 222 Mich App 325, 340; 564 NW2d 104 (1997). In exercising such review, the court reviews the entire record to determine whether the defendant was entitled to summary disposition *Maiden*, *supra* at 118. With respect to a motion under MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Patterson v Kleiman,* 447 Mich 429, 434 n 6; 526 NW2d 879 (1994); *Maiden, supra* at 119. If affidavits, depositions, admissions or other documentary evidence are submitted in support of a (C)(7) motion, the contents must be admissible into evidence. This submission must then be considered by the court in ruling on the motion. *Maiden, supra;* MCR 2.116(G)(5).

B. The republication of defendant Campbell's alleged defamatory statement during the February 25, 2000, broadcast does not revive Plaintiff's untimely claim against defendant Campbell.

The elements of a defamation claim are; (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) actionability of the statement (defamation per se or the existence of special harm.) *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 589; 349 NW2d 529 (1984). The statute of limitations governing actions for defamation is set forth in MCL 600.5805(1) and (8):

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> ***
>
> (8) The period of limitations is 1 year for an action charging libel or slander.

A defamation claim accrues, and the period of limitations begins to run, **on the date of the publication of the defamatory statement**. *Wilson v Knight-Ridder Newspaper, Inc,* 190 Mich App 277, 279; 475 NW2d 388 (1991). **Publication occurs with the initial unprivileged publication of the statement to a third party, whether a plaintiff is aware of that publication or not**. *Kodgins Kennels, Inc v Durbin,* 170 Mich App 474, 479-480; 429 NW2d 189 (1988); *Ledl, supra,* at 589; *Grist v Upjohn Co*, 1 Mich App 72, 81; 134 NW2d 358 (1965).

In its decision, the Court of Appeals observed that "[r]esolution of this appeal centers on the issue of when publication occurred." (Exhibit 7.) The court recognized that a defamation claim generally accrues at the time of the publication, regardless of the plaintiff's knowledge of the statement, and it also noted that "[c]learly the allegedly slanderous material was published originally during the February 22, 2000 interview . . . ." *Id.* In its limited analysis of the issue, however, the court concluded:

> In *Tumbarella v Kroger Co*, 85 Mich. App. 482, 496; 271 N.W.2d 284 (1978), this Court observed that the "general rule is that one who publishes a defamatory statement is liable for the injurious consequences of its repetition where the repetition is the natural and probable result of the original publication." *Tumbarella* involved the circulation of a letter which stated "that plaintiff had been discharged for stealing from defendant, Kroger Company." *Id.* at 495. The plaintiff's testimony supported an inference that the charges in the letter were republished to employees in several different Kroger stores. *Id.* at 496. The *Tumbarella* Court reversed the grant of summary judgment to the defendants, concluding, "the republication at other stores could be found by the trier of fact as a natural and probable consequence of Kroger's original publication of the letter." *Id.* Because this case was decided before 1990, we are not required to follow it. MCR 7.215(J)(1). Nonetheless, we do because we believe it sets forth the best-

reasoned approach to this issue.

> In this case, an issue of fact exists regarding whether the republication of the allegedly defamatory statements in the February 25, 2000 broadcast was the natural and probable result of the original publication to the reporter on February 22, 2000. While a reporter need not publish the information received during an interview, one could plausibly argue that publication of the interview or portions of it is a natural and, indeed, the intended result of the interview being conducted in the first place. See *Burke v Greene*, 963 P.2d 1119, 1122 (Colo Ct App, 1998) (observing that the "plaintiff could potentially recover if he could demonstrate that the newspaper's repetition of the statement was either expressly or impliedly authorized by [the] defendant, or was a natural consequence of the defendant's original publication of the statements to the police"). Under the facts of this case, plaintiff's allegations were sufficient to defeat a motion for summary disposition pursuant to MCR 2.116(C)(7). [*Id.*]

The Court of Appeals further recognized the purpose of statutes of limitation in protecting against stale claims, but determined that allowing Plaintiff's claim to proceed did not violate any of these principles. *Id.*

What the *Tumbarella* Court and the Court of Appeals alluded to is a recognized exception to the general rule in defamation law that the original publisher of a defamatory statement is not liable for the subsequent republication of the statement by another:

> As a general rule, the author or publisher of a defamatory statement incurs no liability, either as a distinct cause of action or by way of enhancing the damages of the original defamation, for a voluntary and unauthorized repetition or republication of the defamatory matter by others who act independently, and this rule has been applied in actions for slander as well as in actions for libel. The basic reason stated by the courts in support of the view of nonliability of the publisher of a defamatory statement for its repetition by others is that such a repetition cannot be considered the natural and probable result of the making of the defamatory statement. . . .
>
> Inherent in the general rule of nonliability is the qualification that if the repetition or republication by others of defamatory words is the natural and probable consequence of the original act of uttering or publishing the libel or slander, the original author will be liable for the damages resulting therefrom. This qualification or limitation of the rule in the case of foreseeability of the repetition has been applied equally in actions for slander and in actions for libel. In such case, it is ordinarily held to be a question for the jury to determine whether the additional circulation given by the third person is a natural consequence of the

> defendant's act, and the burden is on the plaintiff to show that such exception to the general rule exists. [Anno: *Liability of Publisher of Defamatory Statement for its Repetition or Republication by Others*, 96 ALR2d 373.][3]

This exception is recognized, although stated somewhat differently, by 2 Restatement Torts, 2d, § 576:

> The publication of a libel or slander is a legal cause of any special harm resulting from its repetition by a third person if, but only if,
> (a) the third person was privileged to repeat it, or
> (b) the repetition was authorized or intended by the original defamer, or
> (c) the repetition was reasonably to be expected.

This exception to the general rule of nonliability has been adopted by various states, and appears to have formed part of the basis for the *Tumbarella* Court's holding.

For example, in *Wright v Bachmurski*, 29 Kan App 2d 595, 600-601; 29 P3d 979 (2001), the Kansas Court of Appeals adopted the exception, noting:

> Although well settled in other jurisdictions, the effect of republication or repetition of a defamatory statement is an issue of first impression in Kansas.
>
> Each communication of a defamatory statement to a third person generally constitutes a new publication and gives rise to a separate cause of action against the publisher. 50 Am. Jur. 2d, Libel and Slander § 260, p. 521; Restatement (Second) of Torts § 577A, comment a (1977). When that third person then communicates the original defamatory statement to a fourth person it is called republication or repetition. Republication of a libel is a separate tort which creates a separate basis of liability against the republisher. 50 Am. Jur. 2d, Libel and Slander § 261, p. 522; Restatement (Second) of Torts § 578, comment b (1977). The original publisher may also be liable for republication if repetition by third persons was reasonably expected as the natural and probable consequence of the original publication. Restatement (Second) of Torts § 576, comment c (1977); see *Bolduc v. Bailey*, 586 F. Supp. 896, 901 (D. Colo. 1984) (applying Kansas law).
>
> "While defamation is generally incapable of joint commission and does not give rise to solidary [joint and several] liability, whenever two or more persons cooperate in the publication of a libel, all are responsible for the resultant damages, and the victim can sue them either jointly or severally. . . . Even where the words are uttered simultaneously, two or more individuals uttering slanders against the same person cannot be held jointly liable unless the defamation was

[3] Unfortunately, page references for this annotation were not available online.

the result of a concert or conspiracy between them. . . ." 50 Am. Jur. 2d, Libel and Slander § 358, p. 685.

> Applying the law of defamation to the facts of this case, there are two separate and distinct causes of action against Fosdick and Bachmurski [the original publishers] because there were two publications of the defamatory statements. The first action arose from the communication between Fosdick and Bachmurski and the reporter for the newspaper (the original publication). The second cause of action resulted from the newspaper's story based on the communication with Fosdick and Bachmurski (republication).
>
> The Emporia Gazette effectively republished the defamation by writing a story in the newspaper based on Fosdick and Bachmurski's defamatory statements to one of the newspaper's reporters. The republication was a separate tort which created a separate basis for liability against the newspaper without their settlement with Plaintiffs. Fosdick and Bachmurski are also liable for the Emporia gazette's republication because they could have reasonably expected the newspaper to write a story as a natural and probable consequence of the defamatory communication to the reporter.

See also *Barnette v Wilson*, 706 So 2d 1164, 1166-1167 (Ala, 1997) (Holding that "when the original publisher of a defamatory statement might reasonably expect the statement to be repeated, the original publisher is responsible for the damage that results from that repetition."); *Wiggins v Creary*, 475 So 2d 780, 782 (La Ct App, 1985) ("Although the general rule is that the original author of a libelous publication is not to be held liable for the voluntary republication of it by others, an exception exists where the republication is the natural and probable consequence of the defendant's act. . . . It is clear that republication in the newspaper was a natural and probable consequence of [defendant's] statements to the reporter in this case.")

In this case, the Court of Appeals concluded that there was an issue of fact regarding whether the republication by the television station was a natural and probable consequence of defendant Campbell's statement to the reporter. However, even if the broadcast is a natural and probable consequence of the original statement, the Court of Appeals still erred in reversing the trial court's order because the exception to liability should not be held to create an exception to

the generally applicable statute of limitations, or in other words, a new cause of action, absent a special relationship between the original publisher and the republisher.

For example, in *Kramer v Monogram Models, Inc*, 700 F Supp 1348 (DC NJ, 1988), rev'd on other grds, 875 F2d 66 (CA 3, 1989), the plaintiffs, former principals in a toy and hobby products distributor, asserted defamation claims against two other toy suppliers, who on August 20, 1986, issued press releases to a trade magazine stating that they had been victimized by the plaintiffs' fraudulent practices. *Id.* at 1350. The trade magazine later published excerpts of the press releases on September 15, 1986. The plaintiffs' suits were filed on August 21, 1987, and September 13, 1987. *Id.* The plaintiffs did not sue the trade magazine. The defendants moved for summary judgment, arguing that the defamation claims were barred by New Jersey's one-year statute of limitations. *Id.* The court noted that New Jersey's statute "does not speak of the running of the statute as of the day on which the action 'accrues' but rather specifies a particular act which triggers when the limitation period begins. Thus, the 'discovery rule' does not apply and the sole inquiry before the court is when publication occurred." *Id.* at 1351.

The defendants argued that the date of the press release constituted publication. *Id.* The plaintiff argued that the date the trade magazine was released to the public controlled. *Id.* The court rejected the plaintiffs' argument as a misapplication of the "single publication rule," which states that an action against a mass media publisher accrues on the date of the first publication to the public. *Id.* The court noted that "plaintiffs have not joined the mass media publisher but rather have only sued parties that supplied the allegedly libelous press release. Thus, the issue in this case is when it can be fairly said that these defendants 'published' a defamatory statement." *Id.* The court concluded that absent a relationship between the defendants and the trade

magazine, the date of the press release was the publication date, and thus the plaintiffs' claims were untimely. *Id.* at 1351-1352.

The plaintiffs also argued that the defendants should be held liable for the trade magazine's subsequent republications of the press release because republication of the libelous statement was a "'natural and probable result of what the wrongdoer did.'" *Id.* at 1352, quoting *Moore v Allied Chemical Corp*, 480 F Supp 364 (ED Va, 1979). The *Kramer* Court summarized that in *Moore*, *supra*, the plaintiff's company, LSP, had entered into an agreement with the defendant Allied Chemical for the plaintiff to produce the toxin Kepone for exclusive sale to Allied. The *Moore* Court's opinion implied that Allied had recognized the toxic nature of the substance and no longer wanted to produce it in its own plants. When a number of LSP employees became ill from the toxin, officials of Allied made statements to CBS News, for use on the "60 Minutes" show, that plaintiff alleged were libelous. The plaintiff filed suit within one year of a **rebroadcast** of the "60 Minutes" segment, but more than a year after the original broadcast. Allied raised the defense of the one-year statute of limitations for libel actions. In rejecting the bar of the statute for any republication within the one year period, the *Moore* Court emphasized that Allied had spoken on a subject of public concern, and that republications of the statements were the "natural and probable" result of the original publication. *Kramer*, *supra*, at 1352, citing *Moore*, *supra* at 376. The *Kramer* Court observed that in reaching its conclusion the *Moore* Court relied exclusively on the Virginia Supreme Court of Appeals' decision in *Weaver v Beneficial Financial Co*, 199 Va 196; 98 SE2d 687 (1957) – the same case cited by Plaintiff in this matter. The *Kramer* Court summarized:

> In *Weaver*, the plaintiff had gratuitously endorsed a note securing a debt owed to the defendant Beneficial Finance Co. by a third party. When the third party defaulted on the note, Beneficial invoked Weaver's promise to pay. Weaver, too, soon defaulted and Beneficial responded by writing Weaver's employer

requesting that the employer impress upon Weaver the importance of meeting his financial obligations. Apparently, the letter, written February 23, 1955, was placed in Weaver's personnel file and was not revealed until he was considered for a promotion on March 21, 1956. Defendant argued that the action, filed June 8, 1956, was barred by the one year statute of limitations.

The court disagreed, and first set out what it considered the guiding principles:

> It is well settled that the author or originator of a defamation is liable for a republication or repetition thereof by third persons, provided it is the natural and probable consequence of his act, or he has presumptively or actually authorized or directed its republication. This is based upon the principle that such republication constitutes a new cause of action against the original author. However, the original author is not responsible if the republication or repetition is not the natural and probable consequence of his act, but is the independent and unauthorized act of a third party.

Weaver, 98 S.E.2d at 690. Applying those principles to the facts before it, the court concluded that Beneficial intended the letter to be brought to the attention of Weaver's superiors. When that intended event occurred, a new cause of action arose. Plaintiffs argue that the *Weaver* and *Moore* decisions are consistent with New Jersey law and should, therefore, apply here to render defendants liable for the intended republication by Toy & Hobby World of their press release. [Id. at 1352.]

The *Kramer* Court disagreed with the plaintiffs, first noting that neither of the two decisions had been cited by a New Jersey court, and that the court's research had not revealed a single instance in which a New Jersey court had spoken of a "'natural and probable' republication of defamatory statements *within the context of the statute of limitations*." Id. at 1353 (Emphasis added.) The Court observed that it had to determine whether the New Jersey state courts would adopt such a rule and stated that the inquiry, given the dearth of state court authority, "must be two-fold: 1) can it be said that the rule in *Moore* is the "majority view" or "emerging trend" so that it can be said that New Jersey would be likely to adopt it and 2) would adoption of the rule in *Moore* be

consistent with existing state precedent." Id. The *Kramer* Court concluded that because it could not make either finding, it would not apply *Moore* to the facts of that case. Id. The court stated:

> First, *Moore* is far from the majority rule. Although its rationale appears to have been adopted in at least two other states, *Davis v. National Broadcasting Co.*, 320 F. Supp. 1070 (E.D. La. 1972); *Cobb v. Garlington*, 193 S.W. 463 (Tex. Civ. App.), it has been either implicitly or expressly rejected in at least as many jurisdictions in more recent cases. See e.g. *Davis v. Costa-Gavras*, 580 F. Supp. 1082 (S.D.N.Y. 1984) (construing New York law); *Flotech, Inc. v. E.I. DuPont de Nemours Co.*, 627 F. Supp. 358 (D.Mass. 1985) (noting *Moore* but rejecting "continuing tort" and "discovery rule" test in press release case). The *Davis* decision is particularly instructive because of its emphasis on the amount of control the original publisher has over the republication. Here, although it certainly appears that defendants wanted the press release republished, there is absolutely no evidence that they had any right to compel Toy & Hobby World to do so. *Davis*, 580 F. Supp. at 1096 (in order to be contributorily liable defendant must have real authority to cause republication).
>
> Second, adoption of the *Moore* and *Weaver* rules in New Jersey would directly contradict strong precedent of long standing. A close examination of the *Weaver* decision reveals that it is essentially a "discovery rule" case. The court was obviously influenced by the fact that the plaintiff had been unaware of the existence of the letter in his personnel file. In fact, the Maryland Court of Appeals, when faced with the opportunity to adopt *Weaver*, found the facts of the case before it to be conducive to an alternative decision based on discovery rule principles. See *Sears, Roebuck and Co. v. Ulman*, 287 Md. 397, 412 A.2d 1240 (1980). Moreover, the dissenting judges in *Weaver* clearly viewed the decision as contrary to Virginia's rejection of the discovery rule. *Weaver*, 98 S.E.2d at 693 ("we are committed in Virginia to the rule that in tort actions the limitation on the right to sue begins to run when the wrong is committed and not when the plaintiff discovers that he has been damaged").
>
> As mentioned earlier, New Jersey has expressly rejected the discovery rule in defamation cases and has done so in a manner that casts great doubt on a conclusion that New Jersey would adopt *Weaver*.
>
> * * *
>
> In sum, I conclude that because no New Jersey court has even mentioned *Moore*, *Weaver*, or any similar case, and because the holdings of those cases appear incompatible with expressions of this forum's highest state tribunal, I must decline to follow them as well. To do otherwise would cause this court to impermissibly expand, rather than follow, state law. [*Id.* at 1353-1354.]

Thus, the *Kramer* Court held that plaintiffs' defamation claims were time barred. See also *Glenn v Scott Paper Co*, 1993 US Dist LEXIS 14966 (Applying the rationale in *Kramer* to facts in that case to bar action for republication of defamatory statement.)

In the absence of Michigan case law on point, *Kramer* is persuasive authority and this Court should apply a similar analysis to the facts in this case. First, although alluded to in *Tumbarella*, Michigan courts do not appear to have formally adopted the "natural and probable consequences" exception to nonliability of the original publisher for republications, and some courts have refused to adopt this rationale for various reasons. See Anno: *Liability of Publisher of Defamatory Statement for its Repetition or Republication by Others*, 96 ALR2d 373. This Court could simply hold that the facts in this case do not compel the adoption of this test. Here, Defendant Campbell gave the interview on February 22, 2000, the comments were broadcast three days later on February 25, 2000 by WXYZ-TV, a well-known station. Plaintiff does not allege that he failed to discover or was unaware of the February 25 broadcast. In fact, Plaintiff acknowledged that the story has been rebroadcast a number of times. (Exhibit 2, ¶ 5.) Yet Plaintiff waited a year to file the lawsuit on February 26, 2001. This statute of limitations conundrum is of Plaintiff's own making, and he should not be allowed to benefit from his own dilatory tactics. See, e.g, *Model Laundries & Dry Cleaners v Amoco Corp*, 216 Mich App 1, 5; 548 NW2d 242 (1996). Moreover, contrary to the Court of Appeals' decision, Plaintiff did not submit evidence that the broadcast was the "natural and probable" consequence of the original interview. Plaintiff asserted on appeal that repetition of the defamatory statement in the news story was a natural and probable result because Defendant submitted to a videotaped interview, for the exclusive purpose of being repeated by the reporter. (Plaintiff's Brief on Appeal, attached as Exhibit 8.) Plaintiff, however, presented no evidence to the trial court establishing

these facts supporting these conclusions. Plaintiff made no allegations in either the Complaint or First Amended Complaint of facts supporting these conclusions. (Exhibits 2 and 3.) Nothing in the Affidavit presented by defendant Campbell supports these conclusions either. (Exhibit 1.) There is no evidence this interview was videotaped. There is no evidence defendant Campbell submitted to the interview for the exclusive purpose of being repeated in the news story. Plaintiff's assertions were wholly unsupported by the record.

A plaintiff is not required to respond to a motion brought MCR 2.116(C)(7) with supportive material. *Maiden, supra* at 119. However, if such material is submitted, it must be admissible and must be considered. Here, Plaintiff presented no such material in response to Defendant's motion. That left only Defendant's Affidavit and the contents of the complaints for consideration by the trial court, the Court of Appeals, and this Court. *Id.* The trial court itself noted the absence of any facts supporting plaintiff's legal argument for the application of the "natural and probable result" test concluding,

> ... if the parties were shown to be, by the facts to be acting in concert, you could have one liable, one responsible for the later statements and liable for the later one. But in this case where someone is interviewed and the third party may never repeat the statement and could repeat it, could use it, may cut part of it, they may even change it, whatever they wanted to say, the first party is not responsible for that later admission unless there's some other showing. [Exhibit 4, p 12.]

Because there were no fact assertions in either the Affidavit or the complaints to establish that the broadcast of Defendant's statements in the news story was the "natural and probable" result of this interview, Plaintiff failed to raise a question of fact regarding this issue.

Second, as noted by the trial court in this case, no special relationship existed between defendant Campbell and WXYZ-TV, the republisher. Defendant Campbell had no control over when or how her comments would be republished. Like the defendants in *Kramer, supra*, while defendant Campbell may have wanted her statements republished by the station, she had no

ability to control the republication. Notably, this is why the Court of Appeals' reliance on *Tumbarella*, *supra*, is questionable since the republication of the alleged defamatory letter in that case was by the defendant employer's management or employees. See also, *Grist*, *supra*. Thus, the original publisher arguably had control over the republication in that case. Defendant Campbell did not have such control in this case. No such relationship between defendant Campbell and WXYZ-TV exists here. As the trial court succinctly pointed out, Defendant had no control whatsoever over the content of the news story; which statements might be used, if any; when the story might air, if at all; or the purpose and editorial content of the news story. (Exhibit 4, pp 7, 8, 11.)

Third, the Court of Appeals' decision essentially incorporates the "discovery rule" into Michigan defamation law. Notably, in its decision the court relied on *Burke v Green*, 963 P2d 1119 (Colo Ct Ap, 1998), a Colorado case. However, Colorado's statute of limitation for defamation claims specifically incorporates the "discovery rule"; "Such a claim accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence." *Id.* at 1121. Michigan's statute does not. The applicable statute of limitations states that the time for bringing an action is "after the claim first accrued to the plaintiff." MCL 600.5805(1). Michigan courts have continuously held that a defamation action accrues on the date of the publication regardless of whether the plaintiff is aware of the publication. *Ledl*, *supra*. Thus, Michigan courts have not followed "discovery rule" principles in assessing the timing of defamation claims. In fact, most states reject use of the "discovery rule" in defamation cases. See Limitation of Actions: Time of Discovery of Defamation as Determining Accrual of Action, 35 ALR4th 1002. Moreover, this Court has declined to adopt the "discovery rule" in connection with other causes of action. See *Boyle v GMC*, 468 Mich 226,

231; 661 NW2d 557 (2003) (Holding that "discovery rule" does not apply to actions for fraud); *Stephens v Dixon*, 449 Mich 531, 537; 536 NW2d 755 (1995) (Holding that the discovery rule is not available in a case of ordinary negligence); *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995) (Holding that discovery does not apply to intentional tort claims of assault and battery and intentional infliction of emotional distress based on sexual abuse that was discovered from repressed memories.) These decisions are consistent with this Court's repeated recognition of the importance of statutes of limitation.

For example, in refusing to toll the statute of limitations in an employment discrimination case on the basis of the plaintiff's federal filing, this Court stated:

> This Court has long recognized the value of a statute of limitations. In *Shadock v Alpine Plankroad Co*, 79 Mich 7, 13; 44 NW 158 (1889), Justice Campbell said:
>
> "The whole reason for statutes of limitation is found in the danger of losing testimony, and of finding difficulty in getting at precise facts."
>
> In *Wells v The Detroit News, Inc*, 360 Mich 634, 639; 104 NW2d 767 (1960), we said that the "statute of limitations was designed to eliminate stale claims". And in *Bigelow v Walraven*, 392 Mich 566, 570; 221 NW2d 328 (1974), we said that "the statute of limitations is not a disfavored plea but a perfectly righteous defense, a meritorious defense". See, also, *Lothian v Detroit*, 414 Mich 160; 324 NW2d 9 (1982). For these reasons, it is the general rule that exceptions to statutes of limitation are to be strictly construed. See *Bock v Collier*, 175 Or 145; 151 P2d 732 (1944); *Woodruff v Shores*, 354 Mo 742; 190 SW2d 994 (1945); *Slade v Slade*, 81 NM 462; 468 P2d 627 (1970); *Lake v Lietch*, 550 P2d 935 (Okla, 1976). [*Mair v Consumers Power Co*, 419 Mich 74, 80 (1984).]

More recently, in *Herweyer v Clark Hwy Services*, 455 Mich 14; 564 NW2d 857 (1997), this Court commented:

> A statutory period of limitation provides a defense that bars a plaintiff's cause of action because of an undue lapse of time since the cause of action arose. 51 Am Jur 2d, Limitation of Actions, § 2, p 592. There are several policy reasons underlying the adoption of statutes of limitation. They protect defendants' rights by eliminating stale claims, shielding defendants from protracted fear of litigation, and ensuring that they have a fair chance of defending themselves. *Chase v Sabin*, 445 Mich. 190, 199; 516 N.W.2d 60 (1994); *Bigelow v Walraven*, 392 Mich. 566,

576; 221 N.W.2d 328 (1974). Statutes of limitation are also constructed to give plaintiffs a reasonable opportunity to bring suit. *Chase, supra.*

* * *

Statutes of limitation embody the important public policy considerations of stimulating business activity, punishing negligence, and giving security and stability to human affairs in general. 51 Am Jur 2d, Limitation of Actions, § 18, p 603, citing *Kyle v Green Acres at Verona, Inc*, 44 NJ 100; 207 A2d 513 (1965).

A statutory limitation period provides peace of mind to a potential defendant. A defendant can be certain that, once the period expires, extensive defense of a new lawsuit will be unnecessary. A plaintiff, also, is entitled to certainty in legal dealings. Allowing courts to fashion arbitrary periods of limitation depending on the facts of each case sometimes would force claimants to file suit prematurely, lending further instability to employment relations. In many cases, suit would have to be brought before adequate investigation had been completed.

The public policy considerations underlying limitation periods are not advanced, either, by encouraging uncertain periods of limitation. We agree with the Court of Appeals dissent that the applicable statutory limitation period is a straightforward and objective indicator of what period is reasonable. *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982). In the case before us, defendant has not stated a convincing argument why we should abandon the objective indicator and authorize nonspecific contractual periods of limitation. [*Id.* at 19-23.]

Concomitant with this Court's respect for the value of statutes of limitation, is this Court's commitment to fundamental principles of statutory construction, as recently restated in *In re Certified Question*, 468 Mich 109, 113; 659 NW2d 597 (2003):

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Gurwin*, 443 Mich 59, 65; 503 NW2d 435 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward*, 460 Mich 230; 596 NW2d 119 (1999). When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

Although the republication in this case occurred three days after the interview, applying the discovery rule in such cases would institute uncertain periods of limitation. A republication may occur a day later, three months later, two years later, or never. There would simply never be a

period of repose. An original publisher could be held liable for a republication occurring well outside a limitations period. Thus, adoption by the Court of Appeals of a "discovery rule" in this case is contrary to these established principles and simply not warranted in this case.

Notably, in *Stephens*, *supra*, this Court stated, "in deciding whether to strictly enforce a period of limitation or impose the discovery rule, we must carefully balance when the plaintiff learned of [his] injuries, whether [he] was given a fair opportunity to bring [his] suit, and whether defendant's equitable interests would be unfairly prejudiced by tolling the statute of limitations." *Id.* at 536. Here, Plaintiff has not alleged that he was unaware of the broadcast, nor are there any facts suggesting that Plaintiff did not have a fair opportunity to bring his suit. There is simply no reason in this case to ignore the clear and unambiguous language of the statute of limitations.

Based on the above, the Court of Appeals erred in reversing the trial court's grant of summary disposition. Specifically, the court erred in applying an exception to the general rule that the original publisher of a defamatory statement is not liable for its subsequent republication by a third party, and in assuming that the exception creates a new limitations period. The court's decision ignores the clear and unambiguous language of the statute of limitations, and essentially incorporates the "discovery rule" into the statute. This Court should grant leave to appeal in this case to clarify that Michigan courts will not recognize an exception to the statute of limitations based on the repetition of a defamatory statement by a third party. Or, that even if such liability is recognized, that the date of the original publication remains the pertinent date for determining the timeliness of the action.

CONCLUSION AND RELIEF SOUGHT

The Court of Appeals erred in applying an exception to the general rule that the original publisher of a defamatory statement is not liable for its subsequent republication by a third party, and in assuming that the exception creates a new limitations period. The court's decision ignores the clear and unambiguous language of the statute of limitations, and essentially incorporates the "discovery rule" into the statute. This Court should grant leave to appeal in this case to clarify that Michigan courts will not recognize an exception to the statute of limitations based on the repetition of a defamatory statement by a third party. Or, that even if such liability is recognized, that the date of the original publication remains the pertinent date for determining the timeliness of the action.

Respectfully submitted,

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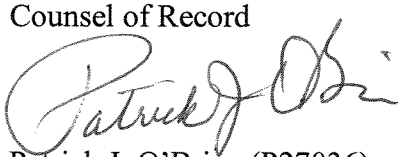

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